IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.3144 OF 2005

1) Thane Municipal Transport)
Undertaking, Administrative Building)
Wagle Depot, Wagle Estate)
Thane.)

2) Transport Manager)
Thane Municipal Transport)
Undertaking, Administrative Building).. Petitioners

Versus

The Employees Union)
T.M.T.C., Administrative Office)
Wagle Industrial Estate, Thane.).. Respondent

Mr.R.S. Apte for the Petitioners.
Mr.S.M. Oak for the Respondent.

CORAM: SMT.NISHITA MHATRE, J.

JUDGMENT RESERVED ON: AUGUST 11, 2005

JUDGMENT PRONOUNCED ON: SEPTEMBER 27, 2005

JUDGMENT :

. Rule. Mr.Oak waives service for the Respondent. By consent, Rule called out and heard forthwith.

2. By this Petition, the judgment dated 14th March 2005 passed by the Industrial Court, Thane in Complaint (ULP) No.457 of 2001, granting permanency to the members of the Respondent Union, has been challenged.

3. The undisputed facts of the case are as follows:

. Petitioner No.1 which is a transport undertaking functioning under the Thane Municipal Corporation employs more than 500 to 600 workmen as badli Drivers and Conductors. These workmen who were listed in Annexure "A" to the Complaint filed before the Industrial Court have been working continuously for more than five years with the Petitioners and have admittedly rendered 240 days of continuous service. Since they were not accorded the status of permanent workmen, the Respondent Union filed a Complaint being Complaint (ULP) No.457 of 2001 under Items 6, 9 and 10 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 (hereinafter referred to as the "MRTU & PULP Act") before the Industrial Court, Thane. The Complaint was resisted by the Petitioners on the ground that the requirement of the Petitioners for these workmen was ad hoc and therefore, there was no question of according permanent status to the workmen. It was also contended by the Petitioners that the posts were not sanctioned by the State Government and, therefore, these workmen could not be made permanent. According to the Petitioners, after filing the Complaint, the Respondent Union had filed Writ Petition No.7951 of 2003 seeking the same prayers in the Writ Petition as were prayed in the Complaint. The Government was directed to decide the

proposal submitted to it by the Petitioners for sanctioning the posts. According to the Petitioners, there is no response from the Government. The Petitioners also contended that although the workmen have completed 240 days in service and have not been made permanent, they are being given some of the benefits which are available to the permanent workmen like leave, bonus, etc.

4. The Industrial Court on perusal of the pleadings and the evidence recorded before it, has held that the Petitioners have committed unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act. The Petitioners have been directed to confer status and privileges of permanent workmen on the workers listed in Annexure "A" to the Complaint from the date when each of them completed 240 days in uninterrupted service. It is this order which is impugned in the present Writ Petition.

5. The entire gravamen of the submission made on behalf of the Petitioners is that although it was true that the workmen had completed 240 days in service, it was not possible to make them permanent in view of the fact that the State Government had not sanctioned the posts. It was submitted that under Section 346 of the Bombay Provincial Municipal Corporation Act, 1949, it

was only the State Government who could sanction the permanent posts and unless there were such clear sanctioned posts available, the workmen could not be made permanent. It was also submitted on behalf of the Petitioners that the proposal sent by the Petitioners for sanctioning 92 posts had met with no response from the Government. According to the learned Advocate for the Petitioners, unless posts are sanctioned, there is no need to accord permanent status to the workmen. Therefore, submits the learned advocate, the Petitioners have not committed the unfair labour practice complained of by the Respondent-Union. Reliance is placed on the judgments of the Supreme Court in the case of *Mahatma Phule Agricultural University and others* vs. *Nasik Zilla Sheth Kamgar Union and others*, **2001 (90) FLR 761** and *Gram Sevak Prashikshan Kendra* vs. *Workmen Employed Under Them Represented by the Manjri Farm Kamgar Union and others*.

6. Per contra, the learned Advocate for the Respondent Union submits that the MRTU & PULP Act must be strictly construed and once there is a failure to implement either an Act, Agreement or Settlement, the employer commits breach of Item 9 of Schedule IV of the MRTU & PULP Act. He further submits that the very fact that the workers have been in service continuously for over five years without according to them the status of

permanent workmen, would indicate that the Petitioners had committed an unfair labour practice under Item 6 of Schedule IV. He submits that the object of keeping such workmen as badlis, casuals or temporaries was to deprive them of the status and privileges available to permanent employees. The Petitioners cannot circumvent the provisions of law by claiming that they had no intention to commit an unfair labour practice, submits the learned advocate. He relies on the judgments in *Executive Engineer, Electrical Division, Nagpur and another* vs. *Prakash Devidas Kalasit*, **1985 Mh.L.J. 338**, *S.G.Chemicals and Dyes Trading Employees' Union* vs. *S.G.Chemicals and Dyes Trading Limited and another*, **(1986) 2 SCC 624**, *Kamani Tubes Ltd.* vs. *Kamani Employees Union and another*, **1987 Mh.L.J. 861**, *Mafatlal Engineering Industries Ltd.* vs. *Mafatlal Engineering Industries Employees' Union and others*, **1991 Mh.L.J. 1359**, *The Chief Officer, Sangli Municipal Council, Sangli* vs. *Shri Daramsing Hiralal Nagarkar*, **1991 II CLR 4**, *Pyarelal* vs. *The Municipal Council, Ramtek and another*, **1992 I CLR 327**, *Chief Conservator of Forests and another* vs. *Jagannath Maruti Kondhare*, **1996 I CLR 680**, *Divisional Manager, Forest Development Corporation of Maharashtra Ltd., Nashik* vs. *Chimna Arjun Jadhav*, **2001 III CLR 57** and *National Textile Corporation (NM) Ltd., Mumbai* vs. *Shivaji Gopal Gorule and another*, **2001 (2) Mh.L.J. 120**.

7. There is no dispute that the workmen have in fact worked for 240 days in service and have rendered more than five years of continuous service. In the case of *Gram Sevak Prashikshan Kendra* (supra), the Supreme Court was concerned with mazdoors who had been posted in the agricultural school established under the Rahuri Agricultural University in Maharashtra under the provisions of the Maharashtra Agricultural Universities Act, 1967. A Reference was made for regularisation of the workmen as they had all completed 240 days in service. The Government had sanctioned only 36 posts whereas the number of workmen employed as mazdoors was far greater. The employer challenged the Award which directed regularisation of service of the mazdoors on permanent basis. The Writ Petition filed by the employer was dismissed by the High Court. This led to Special Leave Petition being filed in the Supreme Court by the workmen concerned. The Supreme Court has held that the workmen do not acquire a permanent status on completing 240 days in service. It was held that the right to be absorbed as a regular employee is contingent on the existence of a sanctioned post. The Supreme Court therefore held that unless there exists a post, temporary employees could not be regularised as permanent employees although they continue every year in service as seasonal workers.

8. In *Mahatma Phule Agricultural University* (supra), the Apex Court was considering a case where the University, aggrieved by the decision of the High Court and the Industrial Court directing regularisation of daily wage labourers as permanent workmen, had filed a Special Leave Petition before the Apex Court. Out of the 4000 daily wage workers, approximately 2000 had raised an industrial dispute which was referred for adjudication before the Tribunal under the Industrial Disputes Act, 1947 (hereinafter referred to as the "ID Act"). The Reference was in respect of the demand of the workmen for permanency, pay scales on the basis of permanency, dearness allowance and enhanced rates of daily wages, house rent allowance, either a vehicular transport or transport allowance and concessional rates, etc. By an Award, the Tribunal disallowed the claim for permanency and wages payable to permanent employees, however, other demands of the workmen were allowed to a certain extent. That Award was not challenged by either side. Thereafter, another 127 daily wage earners raised an industrial dispute for the same demands. The Reference which was made for adjudication before the Tribunal, culminated in an Award. The Tribunal directed that all workmen, out of 127 workmen involved who had completed six months service by a particular day should be treated as permanent workmen. All the others were

directed to be treated as permanent employees once they completed six months in service. The University implemented the Award and the workmen were made permanent employees. Thereafter, it was found that the benefits of the earlier Award were not being granted to the workmen even in the limited manner. Daily wage earners who had not raised any industrial dispute, filed Complaints before the Industrial Court under Items 5, 6, 9 and 10 of Schedule IV of the MRTU & PULP Act. Some Complaints were filed only under Item 6 of Schedule IV. The Industrial Court granted permanency to those who had completed six months in service. Aggrieved by these orders of the Industrial Court, the Universities filed a large number of Petitions before the High Court challenging the orders passed by the Industrial Court in the Complaints filed by the workmen. The High Court dismissed the Petitions by holding that although the workmen could not be granted permanent status in view of the judgment in *Gram Sevak Prashikshan Kendra* (supra), they were entitled to wages and other benefits applicable to the permanent workmen. Aggrieved by this decision of the High Court, the University preferred Civil Appeals before the Supreme Court. The Apex Court held thus :-

> "11. To be seen that, in the impugned judgment, the High Court notes that, as per the law laid down by this Court, status of permanency could not be granted. In spite of

this the High Court indirectly does what it could not do directly. The High Court, without granting the status of permanency, grants wages and other benefits applicable to permanent employees on the specious reasoning that inaction on the part of the Government in not creating posts amounted to unfair labour practice under Item 6 of Schedule IV of MRTU & PULP Act. In so doing the High Court erroneously ignores the fact that approximately 2000 workmen had not even made a claim for permanency before it. Their claim for permanency had been rejected by the Award dated 20th February, 1985. These workmen were only seeking quantification of amounts as per this Award. The challenge, before the High Court, was only to the quantification of the amounts. Yet by this sweeping Order the High Court grants, even to these workmen, the wages and benefits payable to other permanent workmen.

12. Further, Item 6 of Schedule IV of the MRTU & PULP Act reads as follows :

. "6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees"

The complaint was against the Universities. The High Court notes that as there were no posts the employees could not be made permanent. Once it comes to the conclusion that for lack of posts the employees could not be made permanent how could it then go on to hold that they were continued as "badlis", casuals or temporaries with the object of depriving them of the status and privileges of permanent employees. To be noted that the complaint was not against the State Government. The complaint was against the Universities. The reasoning given by the High Court to conclude that the case was squarely covered by Item 6 of Schedule IV of the MRTU & PULP Act cannot be sustained at all and the impugned judgment has to be and is set aside. It is however clarified that the High Court was right in concluding that, as per the law laid down by this Court, status of permanency could not be granted. Thus all Orders wherein permanency has been granted (except Award dt. 1st April 1985 in (IT) No.27 of 1984) also

stand set aside."

9. These judgments in the case of *Gram Sevak Prashikshan Kendra* (supra) and *Mahatma Phule Agricultural University* (supra), were not in respect of industrial establishments. It is in these circumstances that the Supreme Court has held that mere completion of 240 days in service would not lead to the workmen acquiring a permanent status. Furthermore the Court was considering the facts and circumstances which had arisen in a complaint filed under Item 6 of Schedule IV of the MRTU & PULP Act.

10. In the case of *Mahatma Phule Agricultural University* (supra), the Apex Court set aside the judgment of the High Court since the High Court had accorded permanent status to the workmen although they had only sought quantification of the amount as per the Award which had refused permanency to them. The inaction on the part of the State Government to create posts was held to mean that an unfair labour practice could not have been committed by the Universities by keeping the employees as badlis, temporaries or casual workers. The Apex Court held that in view of the judgment in *Gram Sevak Prashikshan Kendra* (supra), the status of permanency could not be accorded to the workmen and, therefore, set aside the orders of the

Industrial Court. However, the Award granting permanent status to the workmen in Reference was maintained.

11. "Industrial establishment" has been defined in sub-clause (ka) of Section 2 of the Industrial Disputes Act, 1947, as under:-

> "(ka) "Industrial establishment or undertaking" means an establishment or undertaking in which any industry is carried on:
>
> . Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then, -
>
> (a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking;
>
> (b) if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activities carried on in such establishment, or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking."

There can be no doubt that the transport undertaking is an industrial establishment falling within the purview of section 2(ka) of the I.D. Act.

12. The term ‘industrial establishment’ has also been defined under the provisions of the Industrial Employment (Standing Orders) Act, 1946. Section 2 sub-clause (e) of this Act defines "industrial establishment" thus:

> "(e) "industrial establishment" means -
>
> (i) an industrial establishment as defined in clause (ii) of Section 2 of the Payment of Wages Act, 1936 (4 or 1936) or
>
> (ii) a factory as defined in clause (m) of Section 2 of the Factories Act, 1948 (63 of 1948);
>
> (iii) a railway as defined in clause (iv) of Section 2 of the Indian Railways Act, 1890 (9 of 1890);

The definition of "industrial establishment" under the Payment of Wages Act, 1936 in sub-clause (ii) of Section 2 reads thus :-

> "(ii) "industrial or other establishment" means any -
>
> (a) tramway service, or motor transport service engaged in carrying passenger or goods or both by road for hire or reward;
>
> (aa) air transport service other than such service belonging to, or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India;
>
> (b) dock, wharf or jetty;
>
> (c) inland vessel, mechanically propelled;
>
> (d) mine, quarry or oil-field;
>
> (e) plantation;
>
> (f) workshop or other establishment in

> which articles are produced, adapted or manufactured, with a view to their use, transport or sale;
>
> (g) establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operation connected with navigation, irrigation, development or maintenance of buildings, roads, bridges or mission and distribution of electricity or any other form of power is being carried on;
>
> (h) any other establishment or class of establishment which the Central Government or a State Government may, having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification in the Official Gazette;"

Admittedly, the Petitioner No.1 is a motor transport service engaged in carrying passengers by road for hire or reward and, therefore, would fall within the scope of definition of sub-clause (a) of clause (ii) of Section 2 of the Payment of Wages Act, 1936. It would necessarily, therefore, fall within the purview of definition of "industrial establishment" contained in Section 2(e) of the Industrial Employment (Standing Orders) Act, 1946.

13. The definitions contained in the Industrial Disputes Act, 1947 are deemed to be incorporated into the MRTU & PULP Act unless otherwise defined. Therefore, the definitions of "industrial establishment" contained in the Industrial Disputes Act, 1947 and the

Industrial Employment (Standing Orders) Act, 1936, are applicable to the Petitioners and would be relevant while considering whether an employer has committed an unfair labour practice under the provisions of the MRTU & PULP Act.

14. Model Standing Orders have been framed under the Industrial Employment (Standing Orders) Act, 1946 Undisputedly, the Model Standing Orders are applicable to the Petitioners. Standing Order 4-C reads as under:

> 4-C. A badli or temporary workman who has put in 190 days' uninterrupted service in the aggregate in any establishment of seasonal nature or 240 days "uninterrupted service" in the aggregate in any other establishment during a period of preceding twelve calendar months, shall be made permanent in that establishment by order in writing signed by the Manager, or any person authorised in that behalf by the Manager, irrespective of whether or not his name is on the muster roll of the establishment throughout the period of the said twelve calendar months.

In the present case, the workmen admittedly have completed 240 days in service. Therefore, under Standing Order 4-C, they are deemed to be permanent workmen.

15. It is trite law that an unfair labour practice is committed under Item 9 of Schedule IV of the MRTU & PULP Act when there is a breach of provisions of law which impliedly become part of the contract of service

or when an Agreement, Settlement or Award was not implemented. In *S.G. Chemicals* (supra), the Apex Court was considering a case where the management had closed down the Marketing Division of the Company without complying with Section 25-O of the Industrial Disputes Act, 1947. A Complaint was filed under Item 9 of Schedule IV complaining of a breach of Section 25-O. The Apex Court while over-ruling the judgment of this Court in the case of Maharashtra General Kamgar Union vs. Glass Containers Pvt. Ltd., (1983) 1 Lab. LJ 326 has held that it was an implied condition of every agreement, including a settlement, that parties thereto would act in conformity with law. Such a provision, according to the Apex Court, was not required to be expressly stated in any contract in force. The Apex Court observed that if services of a workman are terminated in violation of any provisions of the Industrial Disputes Act, such a termination was unlawful and ineffective and that Complaint under Item 9 of Schedule IV would be maintainable. That being the position in law, violation of the provisions of Standing Order 4-C would attract Item 9 of Schedule IV of the MRTU & PULP Act. The Industrial Court has, therefore, rightly held that there is a breach of the provisions of the Model Standing Orders and the Petitioners have committed an unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act.

16. While considering Item 6 of Schedule IV, it is for the Complainant to demonstrate that he has not been made permanent in service although he has worked for several years with a view to deprive him of the status and privileges available to a permanent workman. In the case of NTC (supra), a learned Single Judge of this court (Chandrachud, J.) has held that the very fact that persons have been continued in service as badli workmen for years together, would indicate that the employer had done so with the object of depriving the workmen of a permanent status and privileges available to a permanent employee. In the present case, the workmen have been in continuous service for over five years and each of them has completed 240 days in uninterrupted service. Therefore, the very fact that the employer has continued them as such without according to them the status and privileges of permanent workmen would indicate that an unfair labour practice has been committed. The Industrial Court, therefore, has committed no error by finding that the Petitioners have committed an unfair labour practice under Item 6 of Schedule IV of the MRTU & PULP Act.

17. The question which now remains to be answered is whether the workmen could be made permanent in employment although according to Petitioners the posts

are not sanctioned. While considering this aspect of the matter, it must be borne in mind that the MRTU & PULP Act is a complete code in itself and must be strictly construed. Justifiability of an unfair labour practice under the Act cannot be considered as good reason for condoning the failure to implement the provisions of law. In the case of *Kamani Tubes* (supra), a Division Bench of this Court held that when an employer does not implement an award, settlement or an agreement (in this case it would also include the provisions of law), he fails to implement an award or settlement or an agreement. There being a failure on the part of the employer to implement an award, settlement or agreement, he is guilty of an unfair labour practice set out in Item 9 of Schedule IV of the MRTU & PULP Act. The Division Bench has held vide paragraph 5 as under :-

> "5. Item 9 makes the employer's "failure to implement award, settlement or agreement" an unfair labour practice. When an employer does not implement an award, settlement or agreement he fails to implement the award, settlement or agreement. There is then a failure on the part of the employer to implement an award, settlement or agreement and he is guilty of the unfair labour practice set out in Item 9. The phraseology of Item 9 affords no scope for the taking into account of motive or reason or cause for the failure. To read Item 9 in any manner other than as set out above would be to do violence to its language. To read Item 9 as suggesting that there would be no failure if there was inability to implement would be to read into it the words "without good cause", and that

> would be impermissible. The Industrial Court was, therefore, justified in reading Item 9 in this manner."

In the present case, failure to implement the award, settlement or agreement would also include a breach of the provisions of law which have become a part of the contract of employment.

18. The learned Single Judge of this Court in the case of *Mafatlal Ltd.* (supra), by relying on the view taken by the Division Bench in *Kamani Tubes* (supra) and the judgment of the Division Bench of this Court in *Apar Pvt. Ltd.* vs. *S.R.Samant and Others*, **1980 (II) LLJ 344**, has held that there was no warrant for absolving a guilty party from a finding that an unfair labour practice has been committed by considering any mitigating circumstances or any justification in that behalf.

19. Furthermore, in the case of *J.M. Kondhare* (supra), the Apex Court considered a case where there was an unfair labour practice complained of under Item 6 of Schedule IV of the MRTU & PULP Act. The contention of the employer in that case was that the relief of making workmen permanent by regularising them was not justified inasmuch as some of them were employed under the Maharashtra Employment Guarantee Act, 1977, which would cause a severe burden on the exchequer. The Apex

Court has held that the relief of permanency to the workmen could not be denied merely because they would be required to be paid wages meant for permanent workmen. The right flows automatically from the relief of regularisation to which no objection could reasonably be taken. The Apex Court observed that regularisation could not be denied to a workman only because he was employed under the Maharashtra Employment Guarantee Act, 1977 since that Act did not except the application of the Industrial Disputes Act, 1947.

20. Obviously, therefore, in the present case, the employer has committed an unfair labour practice under the provisions of the MRTU & PULP Act which need to be strictly construed. The effect of a breach of the Standing Order 4-C of the Model Standing Orders, was not considered by the Supreme Court in either of the cases relied on by the learned Advocate for the Petitioners. Standing Order 4-C which is the deeming provision is mandatory and is required to be strictly construed. Once it is held that there is a breach of Standing Order 4-C by the employer for not having made a workman permanent after completion of 240 days in service, it must be held that the employer has committed an unfair labour practice under Item 9 of Schedule IV of the MRTU & PULP Act. The question of posts being sanctioned in an industrial establishment does not arise. There is no

exception carved out under the Industrial Employment (Standing Orders) Act, 1946 that Standing Order 4C need not be enforced if there are no posts available or sanctioned. Undoubtedly therefore the concerned workmen are entitled to the relief granted by the Industrial Court.

21. Reliance placed by the learned Advocate for the Petitioners on Section 346 of the Bombay Provincial Municipal Corporation Act, 1949 also does not carry the Petitioners' case any further. The learned Advocate for the Petitioners relies on the provisions of Section 346(2)(b) of the Bombay Provincial Municipal Corporation Act, 1949 which reads thus :-

> "346. **Statement of permanent officers and servants to be prepared by Transport Manager and sanctioned by Transport Committee.**
>
> (1) xxx xxx xxx
>
> (2) The Transport Committee shall sanction such statement either as it stands or subject to such modifications as it deems expedient :
>
> Provided that -
>
> (a) xxx xxx xxx
>
> (b) the Corporation may by resolution direct that the scales of pay of any specified classes or grades of officers or servants shall not be varied without the approval of the Corporation and, so long as such resolution is in force, the Transport Committee shall not authorise any variation in such scales without such approval.
>
> Explanation : An increase in the salary of

> any permanent office shall be deemed, for the purpose of sub-section (2), to be the creation of a new office if, by reason of such increase, the minimum monthly salary, exclusive of allowances, exceeds two hundred rupees or amounts to five hundred rupees or more, as the case may be, or the maximum monthly salary, exclusive of allowances, amounts to eight hundred rupees or more."

22. The provisions of the Bombay Provincial Municipal Corporation Act, 1949 cannot over-ride the provisions of the Industrial Employment (Standing Orders) Act, 1946, the Industrial Employment (Standing Orders) Act being a special Act when considered vis-a-vis the Bombay Provincial Municipal Corporation Act, 1949. This view has been taken by a learned Single Judge of this Court in the case of *Pyarelal* (supra), where it has been held that between the Municipal law and the Industrial law, it is the Industrial law which would be treated as a special law and, therefore, must prevail over the general law i.e. the Municipal law.

23. In the present case, as I have observed earlier, the Bombay Provincial Municipal Corporation Act, 1949 does not except the provisions of the Industrial Employment (Standing Orders) Act, 1946 whereby a badli workman who is employed continuously in uninterrupted service over 240 days in a calendar year is entitled to permanency. In my view, therefore, the judgment of the Industrial Court could not be faulted and must be upheld.

24. Rule discharged with costs.

25. Learned Advocate appearing for the Petitioners seeks stay of this order for six weeks. Stay granted accordingly for six weeks from today.